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A Preview of America's War Over Same-Sex Civil Marriage

Spurred on by the Supreme Court's landmark ruling decriminalizing gay sexual conduct, both sides in the debate over gay rights are vowing an intense state-by-state fight over deeply polarizing questions, foremost among them whether gays should be allowed to marry.

—*New York Times*, July 6, 2003¹

I KNEW something was wrong when the driver of the pickup truck behind me hit his high beams. It was night, and I was driving on a deserted two-lane road in Vermont. I was driving the speed limit. We were the only two vehicles on the road. The red Chevy, sporting a rifle rack, was occupied by two men, a driver and a front-seat passenger. I slowed to let the truck pass, but it rode my rear bumper, its high beams bathing my car in unwanted light for mile after mile. I was surprised. Most Vermont drivers aren't jerks.

Then I remembered the sticker I had scotch-taped to the rear window of my car. It was a sticker proclaiming my support for gay and lesbian marriage in Vermont. Somehow I knew that this was about my sticker. It was. Eventually, the truck, passed me and screeched off. As it did, the man in its passenger seat shouted to me, "You fucking faggot." This incident occurred at the height of the Vermont controversy over same-sex marriage.

Certain issues always have ignited—and for the foreseeable future will continue to ignite—strong passions in our nation. Same-sex marriage is one of these. Like abortion and capital punishment, same-sex marriage sits on the cultural faultline of morality, religion, and law.

The campaign to allow gay and lesbian couples to share in the legal benefits, legal obligations, and legal responsibilities of marriage has had many different battlefields; this same-sex marriage war, as a historian

of the Civil War once said about that conflict, has been—and is being—fought in 10,000 places. The first battlefield in the twenty-first century was in Vermont.

To glimpse a preview of America's battles-to-come over same-sex marriage, study Vermont's recent experience with the issue: the halting steps forward, the backlash, and, finally, the crafting of a "third way"—civil unions—compromise. Make no mistake. This culture war is coming to a courtroom and a statehouse near you. A series of events in the summer of 2003 guaranteed it.

FREEDOM SUMMER, 2003

O, Canada

The summer of legalized love came early.² It began with *The Kiss*. On June 8, 2003, co-lyricists Marc Shaiman and Scott Whittman won a Tony Award for their work on the Broadway hit "Hairspray." The two men kissed on the lips, hard, on national TV.³ Their liplock celebrated their Tony Award and their 25-year relationship. Shaiman explained to the nation, "We're not allowed to get married in this world. But I'd like to declare in front of all these people, I love you and I'd like to live with you for the rest of my life."⁴

Shaiman was right about not being able to marry when he spoke the words. Two days later, he was no longer right. On June 11, 2003, an Ontario appeals court declared Canada's prohibition against same-sex civil marriage a violation of the country's Charter of Rights and Freedoms,⁵ Canada's counterpart to our Bill of Rights. The court ruled that "the restriction against same-sex marriage is an offense to the dignity of lesbians and gays, because it limits the range of relationship options open to them."⁶ Hours after the court decision, an Ontario judge performed a civil marriage ceremony for Michael Leshner, 55, a Toronto lawyer, and Mike Stark, 45, a graphic designer.⁷ Dozens followed, then hundreds, including several Americans who crossed the border.⁸ An appeals court in British Columbia, Canada's westernmost province, joined Ontario in ruling that gay and lesbian couples have an immediate right to marry.⁹ There was some talk of appealing the court decisions, but in the end the Canadian government decided to embrace it instead.¹⁰ Prime Minister Jean Chrétien announced his cabinet would seek to codify the court decision. Legislation would be drafted, vetted by Canada's

high court, and submitted to the federal parliament.¹¹ Polls suggested that roughly 55 to 60 percent agreed with the prime minister.¹² And so, “with a minimum of fuss, hardly any hysteria, and no rending of garments,”¹³ Canada is on the verge of making it legal for people of the same sex to marry each other. By the time you read these words, gay marriage will almost certainly be the law of the land in all of Canada. That’s how fast the world is changing with respect to gay marriage.

The Texas Privacy Case

Fifteen days after the Ontario appellate court ruled, the United States Supreme Court decided the Texas privacy case, *Lawrence v. Texas*.¹⁴ In a class with the great civil rights landmark cases, *Brown v. Board of Education* and *Roe v. Wade*, *Lawrence v. Texas* should become the Magna Carta of gays and lesbians. If the Justices meant what they said, and if they apply their *Lawrence* ruling faithfully to the issue of same-sex marriage, *Lawrence* paves the way for gay marriage in the United States.

Lawrence itself did not involve marriage. Responding to a weapons disturbance complaint, Houston police officers entered the private home of John Lawrence, where they observed Lawrence and another man, Tyron Gardner, engaged in anal sex.¹⁵ The men were charged with violating a Texas sodomy statute, the “Homosexual Conduct Law,” that made it a crime for two persons of the same sex to engage in certain kinds of intimate sexual conduct,¹⁶ including anal sex. Like a cleansing summer storm, the Supreme Court struck down the Texas sodomy law as a violation of the right to privacy guaranteed by the Due Process Clause of the Fourteenth Amendment. The Court overruled a 1986 decision that states could punish gays for what historically was defined as deviant sex. This much was not surprising. In 2003, only four states outlawed sodomy between gays, and nine others barred sodomy between any sexual partners.¹⁷ These laws were rarely enforced. However, “even if sodomy laws are rarely enforced, they are frequently invoked in civil cases, particularly parental custody and discrimination ones, whether over equal employment opportunities or equal access to school facilities. Sodomy laws, in other words, actually matter a lot—and overturning them could mean toppling an entire edifice of antigay law.”¹⁸

The surprise in *Lawrence* was the broad sweep of the Court’s reasoning. Writing for the five-Justice majority, Justice Anthony Kennedy wrote that gays are “entitled to respect for their private lives.”¹⁹ This

translated into a substantive due process right to privacy: “The state cannot demean their existence or control their destiny by making their private sexual conduct a crime,”²⁰ because “liberty presumes an autonomy of self that includes freedom of thought, expression, and a certain intimate conduct.”²¹ Many people call *Lawrence* a sodomy case. I call it a *privacy* case.

The *Lawrence* Court made clear that its holding was limited to invalidating sodomy laws. Justice Kennedy explained that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,”²² such as same-sex marriage.

A WEDGE ISSUE IS BORN: GAY MARRIAGE AND 2004²³

We [gays and lesbians] can win the freedom to marry. Possibly within five years.

—Evan Wolfson, 2003²⁴

Justice Antonin Scalia, writing for himself, Justice Clarence Thomas, and Chief Justice William Rehnquist, in *Lawrence v. Texas*, was having none of this movement toward gay marriage. In a remarkably nasty dissenting opinion, the hang-hard bloc of the Court urged us to recognize that the majority opinion can lay the groundwork for legal recognition of same-sex civil marriage.²⁵ The Court has taken sides in the “culture war,” and the next step would be “judicial imposition of homosexual marriage, as has recently occurred in Canada.”²⁶ The Scalia/Thomas/Rehnquist dissent charged that the majority had “signed on to the so-called homosexual agenda.”²⁷ The door was now wide open for same-sex marriage—and worse. “State laws against bigamy . . . adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity,” as well as laws barring same-sex marriage, “are called into question by today’s decision” in *Lawrence*.²⁸ The majority “effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive.”²⁹

Well, no. The only state interest asserted by Texas in support of its sodomy law was a general notion of promoting “morality.” The Court

majority held that “morality” was not a strong enough reason to make all gay sex a crime. In constitutional nomenclature, morality was not a sufficient “rational basis” to sustain sodomy statutes. By contrast, laws prohibiting incest, bestiality, and the rest are based on state interests beyond general morality. Justice Sandra Day O’Connor, concurring in *Lawrence*, explained that the Court’s invalidation of the Texas sodomy law did “not mean that other laws distinguishing between heterosexuals and homosexuals would similarly fail under rational basis review. Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations—the asserted state interest in this case—other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”³⁰

Strictly speaking, O’Connor was correct. The brief by the State of Texas cited moral disapproval as the sole justification for the sodomy law. However, a collection of friend-of-the-court briefs asserted another justification: protection of the traditional, heterosexual family. For example, the brief of the Liberty Counsel argued that “states have the right to promote the institution of heterosexual marriage” and that “deregulating human sexual relations will erode the institution of marriage” and will lead to “the abolition of marriage as the union of one man and one woman.”³¹ The Family Research Council and Focus on the Family argued in their brief that “marriage is the union of a man and a woman” and that the Texas sodomy law “is a rational means by which to protect and promote marriage as the union of a man and a woman.”³² A brief filed by 69 members of the Texas legislature justified the sodomy statute as “rationally related to promoting [solely heterosexual] marriage and procreation,” because “protecting marriage is important,” and because the sodomy law “is part of a myriad of state laws promoting marriage and discouraging sexual activity outside of it.”³³ There were many other such briefs, but you get the basic idea.

The Scalia/Thomas/Rehnquist dissenting opinion included this remarkable justification for banning gay love and, presumably, gay marriage as well: “Many Americans do not want persons who openly engage in homosexual conduct as partners in their businesses, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their homes. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and

destructive.”³⁴ (One commentator invited us to “tweak that sentence to read ‘persons who openly engage in Islam’ and see how it reads as a high-court opinion in an allegedly free country.”³⁵ The Scalia/Thomas/Rehnquist dissent did say they had “nothing against homosexuals.”

The dissenting opinion by Justices Scalia, Thomas, and Rehnquist was important in its own right. However, the dissent’s real importance might be its portents for the future. During the 2000 presidential campaign, George W. Bush was often asked what he would seek in a Supreme Court nominee. The first name Bush brought up as his ideal was Justice Scalia.³⁶ Further, one might recall that Anthony Kennedy, author of the *Lawrence* majority opinion, was not President Reagan’s first choice for the Court. Reagan’s first choice was Robert Bork, who didn’t believe that the Constitution protected even a right to *marital* privacy. Had Bork, rather than Kennedy, been confirmed by the Senate, the outcome of *Lawrence* might have been quite different.

Lawrence was a great day for freedom in America. Marc Shaiman—of the Tony Awards kiss—enthused after *Lawrence* that he and his partner were “going to Canada to get married, then Texas for a honeymoon.”³⁷

Liberal publications, such as the *Boston Globe*, *New York Times*, and *Nation*, cheered *Lawrence*, along with libertarian conservatives like William Safire and Andrew Sullivan.³⁸ Perhaps taking the Scalia/Thomas/Rehnquist opinions prediction that *Lawrence* would lead to a “massive disruption of the social order”³⁹ as an invitation, some social conservatives took *Lawrence* as a call to arms. U.S. Senate Majority Leader Bill Frist called for a constitutional amendment to outlaw gay marriage.⁴⁰ The measure rapidly acquired 25 sponsors.⁴¹ (As Congress considers this constitutional amendment, I hope they’ll remember that many Representatives are alive only due to the courage of a gay man, Mark Bingham, a passenger on United Airlines Flight 93;⁴² on September 11, 2001, Flight 93’s target was the U.S. Capitol dome.⁴³) President Bush declined to endorse the constitutional amendment drive.⁴⁴

Some Republicans thought in gay marriage they had found a “wedge issue” for the 2004 presidential campaign.⁴⁵ Most of the nine Democratic contenders supported same-sex civil unions,⁴⁶ that is, extending the legal benefits of marriage but calling it something else—but not gay marriage—including Howard Dean, who, as Governor of Vermont, had signed Vermont’s civil unions statute into law. As of November 2003,

Dean was looking like a front runner: He was leading the Democratic field in fundraising; he had won endorsements by labor unions and by Hollywood fundraising powerhouses such as Rob Reiner and Martin Sheen; he had won a “virtual” primary on the Internet; he was leading in polls in New Hampshire and Iowa; he was holding his own in the Democratic debates; and the media had anointed him as a contender.⁴⁷ On the campaign trail, Dean touted the passage of civil unions in Vermont.⁴⁸ But he wouldn’t support gay marriage.⁴⁹

Newsweek’s cover-story on *Lawrence* was headlined *The War Over Gay Marriage*.⁵⁰ On its cover, *Newsweek* put a photo of two men, and asked the question, *Is Gay Marriage Next?* The editors had considered putting on the cover a Vermont couple who had been joined by civil union.

MASSACHUSETTS: MIRACLE OR MUDDLE?

Only time will tell whether Scalia, Thomas, and Rehnquist were correct that *Lawrence* will be a constitutional earthquake and whether *Lawrence* will lead to same-sex marriage in the United States. Before we can find out, some U.S. state must first recognize same-sex marriage. As of May 2004 no state definitively grants or recognizes gay marriage. The Supreme Judicial Court of Massachusetts could have done so; the court heard oral arguments in *Goodridge v. Department of Health* in March 2003.⁵¹ The *Boston Globe* newspaper editorial page urged the court to recognize gay marriage, and a poll it conducted indicated that a slim majority of the Massachusetts public opinion favored allowing gays to marry.⁵² As the Bay State waited for the court’s decision, the four Catholic bishops of Massachusetts reaffirmed the Roman Catholic Church’s opposition to same-sex marriage. Gay activists lashed back at the church⁵³—an institution already mired in a sex abuse scandal in which male priests molested boys and young men.⁵⁴ The state legislature held hearings on a constitutional amendment to bar same-sex marriage.⁵⁵

Decision day in *Goodridge v. Department of Public Health* came on November 18, 2003.⁵⁶ By a razor-thin margin, the Supreme Judicial Court of Massachusetts ruled that “the right to marry means little if it does not include the right to marry the person of one’s choice.”⁵⁷ The lead opinion in *Goodridge* explained that the “Massachusetts constitution affirms the dignity of all individuals” and “forbids the creation of second-class

citizens.”⁵⁸ The marriage ban “works a deep and scarring hardship” on same-sex families “for no rational reason.”⁵⁹ The court stayed the entry of judgment for 180 days to permit the legislature to take such action as it may deem appropriate in light of this decision.”⁶⁰ The *Goodridge* court did not rely upon the U.S. Supreme Court’s previous ruling in the Texas privacy case, *Lawrence v. Texas*. However *Lawrence* provided the “background music that suffused”⁶¹ the Massachusetts opinion. “The Massachusetts decision and the *Lawrence* rulings were linked in spirit even if not as formal doctrine.”⁶²

Media reports characterized *Goodridge* as a 4-3 decision. In fact, the court split 4-3 and 3-1-3, and there is no way to tell which portions of the lead opinion are majority and which are plurality. Chief Justice Margaret Marshall wrote the lead opinion, in which two other justices joined in full. Her opinion reformulated the common-law definition of civil marriage to mean “the voluntary union of two people as spouses, to the exclusion of all others.” “Marriage is a vital social institution,” wrote the chief justice.⁶³ “The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society.”⁶⁴ For those people “who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits.”⁶⁵ The court maintained that its decision “does not disturb the fundamental value of marriage in our society.”⁶⁶ Limiting marriage to heterosexual couples prevents the children of same-sex unions “from enjoying the immeasurable advantages that flow from the assurance of a stable family structure in which children will be reared, educated, and socialized.”⁶⁷ It cannot be “rational under our laws to penalize children by depriving them of state benefits because of their parents’ sexual orientation.”⁶⁸

The lead *Goodridge* opinion discussed and rejected several rationales for prohibiting same-sex couples from marrying. The government asserted that the state’s interest in regulating marriage is based on the notion that marriage’s primary purpose is procreation. The court flatly responded: “This is not correct.”⁶⁹ Marriage laws in Massachusetts “contain no requirement that applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce.”⁷⁰ Heterosexual couples “who never consummated their marriage, and never plan to, may be and stay married.”⁷¹ Heterosexual “people who cannot stir from

their deathbed may marry.”⁷² In short, “it is the exclusive and permanent commitment of the marriage partners to the marriage, not the begetting of children, that is the sine qua non of marriage.”⁷³

The state also argued that confining marriage to opposite-sex couples ensures the optimal setting for child rearing. However, the *Goodridge* court rebutted, the government “readily concedes that people in same-sex couples may be ‘excellent’ parents.”⁷⁴ Gay and lesbian couples “have children for the same reason others do—to love them, to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws.”⁷⁵ The laws of Massachusetts provide a “cornucopia of substantial benefits to married parents and their children,” but “we are confronted with an entire, sizable class of parents raising children who have absolutely no access to civil marriage and its protections because they are forbidden from procuring a marriage license.”⁷⁶ The marriage ban is what harms the children of same-sex parents. Striking down the ban would help children.

The government further contended that broadening civil marriage to include gay couples would trivialize or destroy traditional marriage. The court countered that the couples in *Goodridge* “seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any other gate-keeping provisions of the marriage licensing laws.”⁷⁷ Allowing same-sex marriage “will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race.”⁷⁸ To the contrary, “extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.”⁷⁹

At first blush, it appears that the *Goodridge* court was requiring gay marriage. But was it? Did the *Goodridge* court mandate gay marriage, or would a parallel system of benefits—civil unions, for example—pass muster under the state constitution? I honestly can’t tell from the court’s lead opinion. The commentary on *Goodridge* amounts to a Rorschach

blot; it reveals more about the preconceived attitudes and biases of the commentators than it does the *Goodridge* opinion itself.

On the one hand, *Goodridge* emphasized the importance of the freedom of choice to marry and of the right to privacy in making intimate decisions. The court treated marriage as a civil right, and the ruling did not say whether civil unions might suffice. Harvard Law School professors Lawrence Tribe and Elizabeth Bartholet read *Goodridge* as requiring marriage.⁸⁰

On the other hand, Governor Mitt Romney and State Attorney General Thomas Reilly read *Goodridge* to suggest that a civil unions statute would be enough.⁸¹ The question before the court was “whether, consistent with the Massachusetts’s constitution, the Commonwealth may deny the *protections, benefits, and obligations* conferred by civil marriage” to gay couples.⁸² And the dispositional portion of the *Goodridge* opinion held that “barring an individual from the *protections, benefits, and obligations of civil marriage* solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”⁸³ Further, although the court said that the constitution “forbids the creation of second-class citizens,”⁸⁴ it is not clear that civil unions constitute second-class citizenship. As I discuss later in this book, the Vermont Supreme Court, the Vermont legislature, and gay-rights academics such as William Eskridge and Greg Johnson argue that civil unions are not second-class citizenship. I disagree, but reasonable people can conclude that civil unions are not second-class citizenship. Finally, the lead opinion in *Goodridge* is in part a plurality, not a majority, opinion. The fourth vote was provided by Justice John Greaney, who concurred “with the result reached by the court, the remedy ordered, and much of the reasoning in the court’s opinion.”⁸⁵ Because Justice Greaney did not specify with which parts of the lead opinion he agreed, there is no way to tell which portions of the lead opinion are majority and which are plurality. Massachusetts could “overrule” *Goodridge* by amending the state constitution, but such an amendment could not be finalized until November 2006 because it must be approved by the legislature in two consecutive sessions, and then sent to the voters for ratification.⁸⁶

Reaction to *Goodridge* was swift and thunderous. The Reverend Louis Sheldon, chairman of the Traditional Values Coalition in Washington, D.C., declared that “Massachusetts is our Iwo Jima. For us, it’s our last stand. We’re going to raise the flag.”⁸⁷ A syndicated columnist accused

the court of “judicial tyranny” and of “arrogating imperious powers to itself;” the opinion itself was “intellectually fraudulent.”⁸⁸ Another columnist asked whether “homosexuals comprehend that marriages involve responsibilities as well as privileges? Blood tests, for one thing. . . . Do homosexuals really want to take blood tests? Maybe gays aren’t worried about [sexually transmitted diseases] anymore.”⁸⁹ This columnist contended that the court’s “insanity” will require invalidation of legal bans on incest and polygamy.⁹⁰ Another syndicated columnist explained that marriage “was established by God as the best arrangement for fallen humanity to organize and protect itself and create and rear children”; warned that “what is happening in our culture is an unraveling of all we once considered normal”; and urged the voters in 2004 to “pull the country back from the precipice,” stating that “marriage defined should be the social-issue centerpiece of the coming [presidential] campaign.”⁹¹ Another columnist declared “it’s now midnight in Massachusetts,” as the state “now inches closer to a shameful reality, all because of the success militant homosexuals have had” in pushing their “aberrant agenda.”⁹² The official newspaper of the Catholic Archdiocese of Boston warned Democratic politicians that a “new political reality certainly requires careful consideration of the way Catholics cast their votes. Catholics need to seek out their candidates’ views and positions on crucial issues, such as the definition of marriage.”⁹³

The Massachusetts high court resolved the *Goodridge* ambiguity on January 4, 2004. A majority of the justices explained that *Goodridge* required marriage. Civil unions would not suffice: Civil unions would be an “unconstitutional, inferior, and discriminatory status for same-sex couples. . . . Separate is seldom, if ever, equal.” In other words, the Massachusetts court concluded that the only thing equal to marriage is marriage.

This tumult was all quite familiar to those of us living in Vermont in 2000. We’d been there before.

BATTLEFIELD VERMONT

On December 20, 1999, the Vermont Supreme Court made history. In Stan Baker’s case,⁹⁴ the court held that the Vermont constitution guarantees same-sex couples the same legal benefits and protections now received as a matter of course by heterosexual couples who are married.

“Our common humanity” demands no less, the court ruled. The court then gave the legislature the first opportunity to fashion a mechanism to implement the guarantee of marital equality. The legislators had three basic⁹⁵ options. The legislature could simply open up the institution of civil marriage to include gay and lesbian couples or ignore the court’s invitation and leave it to the judiciary to make real the right the court had just recognized.⁹⁶ Or the lawmakers could adopt a “third way”—between the extremes of doing nothing or everything—and create a parallel system that offers same-sex couples every legal benefit and responsibility of marriage without the name.⁹⁷ In choosing the third way, the Vermont legislature created the most comprehensive system of same-sex benefits in the nation.⁹⁸ The legislature called its concept “civil unions.”

According to Vermont Law School Professor Greg Johnson, the Vermont statute created nothing less than “the most advanced domestic partnership in the world at the time.”⁹⁹ The statute extends more than 300 benefits,¹⁰⁰ now granted automatically by law to married heterosexuals, to same-sex couples. The day after the Vermont Senate passed the bill, the *New York Times* called it “an American first”¹⁰¹ and the *L.A. Times* noted that “supporters and opponents alike view it as the country’s most comprehensive gay rights legislation—the boldest step in an expanding movement to extend legal benefits to gay and lesbian couples.”¹⁰²

Before Vermont, judicial victories for same-sex couples were soon followed by electoral defeats. The Hawaii Supreme Court, for instance, suggested in 1993 that the denial of marriage licenses to same-sex couples might violate the state constitution,¹⁰³ and an Alaska trial court ruled in 1998 in favor of same-sex marriage.¹⁰⁴ “The court victories in Hawaii and Alaska were erased by popular votes on [amendments to the respective state constitutions on] the same day (and by the same 2/3–1/3 percentage) in November 1998.”¹⁰⁵

The court decision in Stan Baker’s case and its aftermath received extraordinary national and international media attention. Literally hundreds of substantial news stories on the Vermont events were published in newspapers outside of Vermont.¹⁰⁶ The decision in Stan Baker’s case was a lead story on the top of the front page of the *New York Times* and the *Boston Globe*.¹⁰⁷ Both the *Times* and the *Globe* wrote editorials on the decision. The lead editorial in the *Times* was headlined “Vermont’s Mo-

mentous Ruling.”¹⁰⁸ The *Globe* called *Baker* a recognition of reality as well as an acknowledgment of “our common humanity.”¹⁰⁹ The international press also followed the story closely.¹¹⁰ The attention to Vermont has not been a one-time media event. Over the following years, more than a half-dozen state legislatures considered bills patterned after Vermont’s civil unions statute.

The significance of this story reaches far beyond the geographical borders of the Green Mountain State. The Vermont events have been a catalyst for national developments on an issue of widespread national interest and importance.

This is a story that transcends regional boundaries as well as gay/straight categories. Vermont’s story is—and will continue to be—America’s story.

LIKE SPORES ON THE WIND

[The vast majority of the same-sex couples receiving civil unions in Vermont] do not live in Vermont. Once they’re back home, legal issues are sure to rise as they separate, die, or try to file joint tax returns. One by one, state courts will be asked to recognize Vermont civil unions by applying that state’s law or their own.

—*National Law Journal*, December 2000¹¹¹

The civil unions legislation put Vermont on a collision course with other states and with an act of Congress. At least two states, Nevada and Nebraska, have passed measures explicitly refusing to recognize civil unions such as Vermont’s.¹¹² At the time Vermont’s bill was passed, 31 states and the federal government had enacted statutes or state constitutional amendments refusing to recognize same-sex marriages in those or any other states. Within six months of Vermont’s enactment of its new law, the number of states banning recognition of same-sex marriage had risen to 35.¹¹³ The number is now 37; Texas became the 37th when it banned gay marriage in May 2003.¹¹⁴ (Interestingly, at the time the courts held state bans on interracial marriage unconstitutional, “30 states had laws and six states had constitutional provisions prohibiting African Americans and whites from marrying.”¹¹⁵ I’d guess that many of the 37 that bar same-sex marriage today were the same states that banned interracial marriage back then).

It isn't just the states that explicitly refuse to recognize same-sex marriage—federal law does as well. In 1996, an election year, Congress passed the "Defense of Marriage Act" or DOMA. The DOMA provided in part that "no state . . . shall be required to give effect to any public act, record or judicial proceeding in any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, . . . or a right or claim arising from such relationship."¹¹⁶ The 1996 act also defined "marriage" and "spouse" for purposes of federal agencies and federal regulations.¹¹⁷ For purposes of federal agencies, marriage is "only a legal union between one man and one woman as husband and wife."¹¹⁸ For purposes of federal regulations, "the word 'spouse' refers only to a person of the opposite sex who is a husband and wife."¹¹⁹ The federal DOMA "sailed through Congress by margins of 342 to 67 in the House and 85 to 14 in the Senate. DOMA was signed into law without a whimper by [President Bill Clinton] in a private ceremony."¹²⁰

There is a strong argument that the DOMAs are unconstitutional,¹²¹ but, before their legality can be tested, a state must recognize same-sex marriage or civil unions must be treated as the legal equivalent of marriage for purposes of interstate portability. The federal DOMA was enacted when many observers expected Hawaii to recognize same-sex marriage, but Hawaii declined to do so.¹²²

Vermont's civil unions law will continue to have a national impact for two simple reasons: demographics and legal uncertainty. As of July 11, 2003, Vermont had recorded 5,786 civil unions, according to the state's public health statistics chief.¹²³ Eighty-five percent of these civil union licenses have been issued to *non-Vermont* residents.¹²⁴ This means that thousands of nonresidents come to Vermont, get "civilly unionized," and return to their home states to live. Inevitably, the resident states will have to decide what recognition, if any, they will give to the Vermont civil union.

For example, a lesbian couple from Georgia received a Vermont civil union. Back in Georgia, the couple raised a legal argument that Georgia should treat the Vermont civil union as a legal marriage.¹²⁵ The Georgia Court of Appeals refused to recognize the civil union.¹²⁶ The same thing happened in Connecticut; an appellate court refused to dissolve a Vermont civil union;¹²⁷ the Connecticut Supreme Court agreed to take up the issue, but the plaintiff died of HIV-AIDS before the court ruled. And

in Texas, a couple sought to dissolve a Vermont civil union.¹²⁸ A Texas district judge initially agreed to grant the divorce, but the state attorney general stepped in. The Attorney General “feared granting the divorce would signal that the state recognized the union in the first place.” He argued that “a court cannot grant a divorce where no marriage existed.”¹²⁹ The judge agreed and reversed himself.¹³⁰ By contrast, a West Virginia family court judge did agree to use divorce laws to dissolve a civil union.¹³¹ A Mississippi court ruled in favor of a lesbian couple from Vermont who sought to have both their names listed on the birth certificate of a boy adopted from Mississippi five years previously.¹³² Same-sex couples in New Jersey and Indiana have filed a lawsuit seeking to overturn that state’s ban on gay marriage.¹³³ And so on.

Likewise, legal uncertainty spawns litigation. Had Vermont simply authorized same-sex marriage, the duties of other states to recognize such marriages would have been uncertain enough. Perhaps, as Mark Strasser has argued, the Privileges and Immunities clauses of the Constitution would require other states to recognize Vermont same-sex marriages.¹³⁴ Perhaps the Constitution’s Full Faith and Credit Clause would mandate such a result.¹³⁵ Perhaps “choice of law”¹³⁶ theory will require other states to recognize Vermont civil unions. How such legal guarantees interact with the federal and state “Defense of Marriage Acts” (assuming the DOMAs themselves pass constitutional muster),¹³⁷ and how the DOMAs might be affected by federal and state antidiscrimination laws, would have increased the indefiniteness of the portability of Vermont same-sex marriages. That Vermont adopted civil union—not same-sex marriage—magnifies the legal uncertainty.

The Supreme Court’s 2003 decision in the Texas privacy case, *Lawrence v. Texas*, ratchets up the uncertainty yet another few notches. The right to privacy rationale of *Lawrence*—and the Court’s denunciation of law that demeans the lives of gays and lesbians—raise serious doubts about whether the DOMA statutes are constitutional. On this score the Scalia/Rehnquist/Thomas dissent in *Lawrence* was right on target.

As Greg Johnson observed, the only certainty is that “until other states adopt civil unions or same-sex marriage, what we will likely see is a wave of full faith and credit litigation, as couples civilly united in Vermont sue for marital protections in other states.”¹³⁸ “Wave” seems the operative metaphor. The *National Law Journal* reported in December

2000 that “gay and lesbian lawyers across the country were bracing for a wave of litigation over the status of same-sex couples whose relationships have been given a new status in the state of Vermont.”¹³⁹

During 2003, legislatures in Connecticut, Montana, and Rhode Island debated bills that would have authorized same-sex marriage.¹⁴⁰ In seven states, civil unions bills, patterned after Vermont’s, were introduced.¹⁴¹ Five died. As of this writing, civil unions bills were still pending in Massachusetts and California.¹⁴²

The upshot is that “one by one, state courts will be asked to recognize Vermont civil unions by applying that state’s law or their own.”¹⁴³ Activists on both sides of the culture war know it. The facts on the ground—that the impact of Vermont’s civil unions law would extend to every state in the nation—is precisely why the national partisans on both sides of the issue devoted so many resources to Vermont during the civil unions battles. Nonresident civil unions will spread the influence of the Vermont law like spores on the wind.

Gary Bauer and William Raspberry agree on virtually nothing. Bauer is an erstwhile Republican presidential candidate and founder of the conservative Campaign for Working Families. Raspberry is a nationally syndicated columnist, a liberal, and an African American. Bauer is a ferocious opponent of Vermont’s civil unions law; Raspberry is an equally ferocious supporter of the statute. The two men agree, however, on the law’s national significance. According to Bauer, “The Vermont legislature has taken a major step toward radically redefining our most important social institution and overturning 4,000 years of Judeo-Christian moral teaching.”¹⁴⁴ Raspberry responded, “You know what? I agree with [Bauer]. The Vermont law is a prelude to a radical redefinition of marriage.”¹⁴⁵

“If there were any lingering questions about whether the nation was watching Vermont’s civil union debate unfold, those questions were put to rest on Sunday [April 30, 2000] on Constitution Avenue.”¹⁴⁶ That day was the culmination of the Millennium March on Washington, D.C., the fourth national march in the nation’s capital in 31 years. Hundreds of thousands of people attended the march, which occurred only days after the Vermont civil unions bill was signed into law.

“As soon as Vermont’s banner-carrying brigade inched its way into the parade lineup for the Millennium March on Washington, the roar went up from the crowd. ‘Thank you Vermont!’ was the common re-

frain among the thousands of gays and lesbians who lined the parade route. . . . The cheering was constant for the duration of the Vermont group's hour-long march from the Washington Monument to the Mall. . . . The roughly 125 Vermonters who marched behind the Vermont Freedom to Marry Task Force banner were treated as heroes for the cause."¹⁴⁷

Among others praising Vermont at the rally was U.S. Representative Jerrold Nadler of New York. "'Vermont stands as a beacon of hope to everyone in the nation who is truly interested in equality,' [Nadler] said. It appeared that nearly everyone at the march was aware of the law and its potential consequences for the rest of the country."¹⁴⁸

National opinion magazines took predictable positions on the civil union law. The conservative *Weekly Standard* ran a cover story headlined "Who Lost Vermont?"¹⁴⁹ The issue included two lengthy denunciations of civil unions. The first urged that Vermont be "give[n] . . . to Canada" and bemoaned the "sad decline of the Green Mountain State."¹⁵⁰ The piece trashed the state supreme court justices as "all career government lawyers who couldn't get elected dogcatcher at most town meetings."¹⁵¹ The other article, by David Coolidge, described the civil unions statute as the culmination of "the long march to legitimize homosexuality in Vermont" and warned other states that they may be "forced to follow" Vermont's example.¹⁵²

From the opposite end of the political spectrum, *Mother Jones* magazine published a long love letter supporting same-sex marriage in general and Vermont's civil unions statute in particular.¹⁵³ The article praised *Baker* and the statute that followed as "a landmark victory in the decades-long nationwide struggle for legal recognition of gay relationships." The civil unions law was nothing less than a signal of "a sea change in American cultural politics. For the first time, the seemingly unstoppable antigay political juggernaut was halted—by a group of unlikely combatants in a rural state."¹⁵⁴

The academic literature on the issue of same-sex marriage and civil unions was lively even before *Baker* and the civil unions law. It will continue to multiply in the wake of Vermont's civil unions law.¹⁵⁵ The Vermont law has already generated dozens of scholarly articles and several excellent academic books.¹⁵⁶

Thus, understanding the Vermont events is crucial to understanding the issue of same-sex marriage in America. To outside observers, the

Vermont experience has been simplified into caricatures and sound bites: either a progressive state doing the right thing, or a victory for the culturally destabilizing forces of sexual permissiveness and promiscuity. Like most clichés, these contain a kernel of truth.

However, the Vermont experience was actually far more complex, and far more interesting. The truth, like the devil, is in the details. Any “lessons” from Vermont’s encounter with the issue of same-sex marriage must be grounded in an accurate understanding of exactly what happened here during the year 2000. My aim in this book is to tell that story. Although Vermont has received widespread national attention, there has yet to be an inside account of what actually went on here. This is one of those stories in which you really needed to have been here—and to have taken good notes—to understand and appreciate what was occurring on the ground. I am not a native Vermonter (I’ve lived here only 15 years, barely a nanosecond in Green Mountain time), but I follow politics and culture here closely.

Rosa Parks once said, “I knew someone had to take the first step.”¹⁵⁷ Vermont seemed an especially hospitable place to give comprehensive legal recognition to same-sex couples. In 1990 sexual orientation was included as a protected group under the state statute imposing increased penalties for crimes motivated by hatred of a particular group.¹⁵⁸ In 1992 Vermont enacted a civil rights statute that identified sexual orientation as a protected class under all the state’s antidiscrimination laws.¹⁵⁹ The next year, the Vermont Supreme Court became the first court of last resort in the nation to rule that a lesbian can adopt her partner’s children.¹⁶⁰ The following year, Vermont became the first state in the country to offer health insurance benefits to domestic partners of state employees.

It was in this context that the Vermont Supreme Court in *Baker* held that same-sex couples are constitutionally guaranteed marital parity with heterosexual couples. It was in this context that the Vermont legislature passed, and the governor signed into law, the most sweeping domestic partnership system in the nation and the world at the time.

There are two Vermonts. The first Vermont consists of people whose families have lived here for generations. With many exceptions, this Vermont tends to be conservative, traditional, and rooted in the values of rural America. The second Vermont consists of people like me: transplanted urbanites from places like Boston, New York City, or, in my

case, Washington, D.C. With many exceptions, this Vermont tends to be liberal, nontraditional, and rooted in the ethos of the city. The political consequence of this influx of flatlanders has been the erosion of the state Republican party and the growth of the state Democratic and Progressive parties.

On many issues—the environment and banning billboards from the highways, for example—the two Vermonts coexist comfortably. Two recent issues of public policy have exposed the divisions between the two Vermonts. Both policy fights began with controversial rulings by the Vermont Supreme Court and ended with legislative enactments. One was school funding. The other was same-sex marriage.

The good news was that the legislature responded to *Baker* by enacting the sweeping civil unions statute. The bad news was the reason that Vermont did not simply open up its marriage laws¹⁶¹ to include same-sex couples: That reason was what the politicians called political reality. And “political reality” was a polite term for homophobia.

Then-Governor Howard Dean illustrated Vermont’s divided soul. On the one hand, Governor Dean emphatically rejected same-sex marriage. On the other hand, he worked hard to secure legislative enactment of civil unions.

Examples abound of the national hostility to same-sex marriage specifically and homosexuality generally. A poll published by *Newsweek* for the week ending March 20, 2000—as the same-sex marriage debate raged in Vermont—found that 57 percent of the general public are opposed to same-sex marriage; “50 percent say gays should not adopt; 36 percent say gays should not teach elementary school. Six in 10 gay men and women perceive ‘a lot’ of discrimination against homosexuals.”¹⁶²

A random survey of 71,570 military officers and enlisted personnel found widespread harassment based on sexual orientation in the military. “Eighty percent of service members questioned by the Pentagon’s inspector general reported hearing antigay remarks during the last year and 33 percent said they heard them often or very often. . . . Antigay remarks and harassment are commonplace in the American military, especially in the form of offensive speech and gestures, and an overwhelming majority of service members believe their superiors and colleagues tolerate it ‘to some extent.’”¹⁶³ The numbers were troubling: “While 80 percent reported hearing ‘offensive comments’ about gays,

even more—85 percent—believed that the comments were tolerated within their units.”¹⁶⁴ Thirty-seven percent said they had “witnessed or experienced some form of harassment” and, of these, in more than half “service members said they had witnessed or experienced that harassment in the form of graffiti, vandalism, threats, unfair discipline, discrimination in training or career opportunities or even physical assaults.”¹⁶⁵ The survey was ordered after a gay soldier was beaten to death with a baseball bat at Fort Campbell, Kentucky.¹⁶⁶

Gays “as a group are still among the most despised minorities.”¹⁶⁷ In its most lethal form, such hostility has led to murder: “Hate crimes like the murder of Matthew Shepard and Pfc. Barry Winchell, beaten to death in his bunk at Fort Campbell, Ky., [in July 1999] shatter the most deeply cherished notions of security.”¹⁶⁸

Hostility towards gays and lesbians remains politically acceptable, unlike hostility towards African Americans. Consider two senators, Trent Lott and Rick Santorum. In 2002, Trent Lott waxed nostalgic about the good old days of Jim Crow America. Despite his serial apologies, Lott was roundly condemned by everyone from President Bush to the *Weekly Standard*. Lott had to step down as Senate Majority Leader. In 2003, Senator Rick Santorum equated gay love with bestiality and adultery.¹⁶⁹ Santorum claimed he was quoted out of context, but he did not apologize. President Bush remained silent. Santorum still holds his position as the #3 Republican in the U.S. Senate.

I don’t mean to suggest that Vermont is immune from the nation’s homophobia. It isn’t. Homophobia is alive and well in Vermont, as I will demonstrate later in this book. Indeed, the post-*Baker* Vermont legislation was all the more remarkable because many, many Vermonters—probably more than a majority—opposed it; because a hefty percentage of such opposition was fierce; and because each and every senator and representative who voted for the bill did so in the knowledge that, within a matter of months, all of them would face reelection. More than a few legislators knew full well that they were risking political suicide in voting for the bill, but they voted for it anyway. How they, and how Vermont, came to that point is a fascinating case study in republican government at work trying to resolve one of the most emotionally contentious civil rights issues of our time. Vermont is a unique example of republican government in action, and it is that story I want to tell in this book. Along with a few others.